National Labor Relations Board
OFFICE OF THE GENERAL COUNSEL
Advice Memorandum

DATE: June 21, 1995

TO: Peter W. Hirsch, Regional Director, Region 4

FROM: Barry J. Kearney, Acting General Counsel, Division of Advice

SUBJECT: Michelin Tire Corporation and George Leno, Associates, Inc., May 26, 1995; Michelin Tire Corporation and George Leno Associates, Inc., Case 4-CA-23459; Case 4-CA-23459

524-5012-5000, 524-5012-7600, 737-2850-4400

This case was submitted for advice on the issue of whether the new employer of a warehouse operation refused to hire employees of the old employer in order to avoid a successorship. The Charging Party has also submitted a Section 10(j) request.

FACTS

For many years, Leno has operated a tire warehouse for a single customer, Goodrich Tire, its purchaser Uniroyal-Goodrich, and since the early 1990's, Michelin Tire, the purchaser of Uniroyal-Goodrich. The Region has concluded that Michelin was never an alter ego, coemployer or joint employer of the unit employees of Leno, but instead that Leno was always an independent contractor. The warehousemen have long been represented by Teamsters Local 169 (the Union).

On November 3, 1994, a Leno representative told the assembled Leno employees that Michelin was taking over the warehouse on January 31, 1995. A Michelin representative told the employees about the takeover.[(1)]

In response to questions about the status of the Union, the representative said that Michelin did not "like" unions, did not "deal with" them; and that unions would not be present or needed at the Michelin operation. The Region has concluded that these statements were in violation of Section 8(a)(1).

Commencing in early November, Michelin began running advertisements in local newspapers, in which it sought warehouse personnel. The advertisements named Michelin and gave the address of its warehouse. Michelin received approximately 250 replies, and interviewed about 10 percent of the applicants.

By mid-December, Michelin had already tentatively decided not to hire 17 of the Leno employees based on its hiring criteria. Nonetheless, in early January, 1995, Michelin interviewed the Leno employees along with other applicants. Ultimately, Michelin retained five of the 23 former Leno employees and three former Leno supervisors, who became Michelin unit employees. Michelin also has hired 12 new employees, all of whom had at least some work experience as material handlers. A Michelin representative told a number of Leno employees that Michelin preferred to deal with employees on a one-to-one basis, without a union, and asked at least one employee about whether his past experience was with organized employers. The Region has concluded that these statements were in violation of Section 8(a)(1).

Michelin asserts that it applied its hiring criteria to the new hires and to the former Leno employees. Further, Michelin has applied these or very similar criteria since 1989 in the context of facility acquisition and consolidations and in evaluating current employees in all its plants. As a result of applying these criteria, Michelin asserts that it has hired a majority of former unionized employees on some occasions and in others it has not. Under these criteria in their current form, employees were not eligible for employment if they met any of the following: (1) six absences during the past 18 months; (2) five tardinesses during the past 18 months; (3) two or more disciplinary warnings during the past 18 months; (4) a single safety violation during the past 18 months; or (5) a poor reference check.[(2)]

Michelin applied the foregoing criteria mechanically. All but one of the former Leno employees who were eliminated from hire were eliminated because of excessive absences and tardinesses. None of the former Leno employees, Leno supervisors, or new hires hired by Michelin failed any of the foregoing tests.

As to the Employer's current plants, the Employer's "Distribution Warehouse Performance Review Guide" dated January 1993, reveals that the Employer evaluates employees based on the above criteria.(3)

During the hiring of the new off-the-street employees, Michelin asked applicants about their tardinesses and absences, and made good faith efforts to check out the references of the new hires and to try to learn whether the criteria were met.(4) Nine of the 12 off-the-street hires had prior union affiliations, some of which would have been apparent to Michelin at time of interview from the applications themselves in that union employers were listed. In fact, one of the nine is the brother of one of the not hired former Leno employees and has been a member of the Union in the past.

As a result of Michelin's having failed to fill more than half of the unit positions with former Leno unit employees, Michelin refused to recognize the Union

ACTION

We conclude in agreement with the Region, that the charges should be dismissed, absent withdrawal, because there is insufficient evidence to establish that Michelin discriminatorily refused to hire the Leno employees.

Although it is well established that the buyer of a business is not obligated to hire its predecessor's employees, the new employer may not refuse to hire the former employees because of their union membership in order to avoid the obligation of a successor-employer.(5)

Where, as here, there is evidence of unlawful intent, namely the Michelin statements of November 3, 1994 and early January 1995, Michelin is required to demonstrate that it would have acted in the same manner even in the absence of protected conduct.(6)

In the instant case, Michelin's hiring standards are established, universal and rational. Thus, in 1989 Michelin began to develop the standards which are now used to evaluate both employees involved in acquisitions and consolidations, and current employees at operating facilities, and made those standards universally applicable to its operations in the United States. Michelin applied these objective standards to the former Leno employees, the former Leno supervisors, and the new hires. As a result of the application of the standards, Michelin offered employment to, and hired, five of the former Leno employees. Further, the standards bear an obvious relation to on-the-job performance in that they concern absenteeism, tardiness, safety, discipline and work references. And, there was nothing in the characters of the 12 off-the-street hires that made irrational their having been hired. In this regard, we note that review of their applications revealed that they all had material-handling experience, and that none had any quality that would make irrational his being hired.

Finally, when the Employer applied these standards in the past in the context of facility acquisitions or consolidations, it has hired a majority of former unionized employees on one occasion i.e., the Los Angeles facility, and in others, it has not. In short, there simply is insufficient evidence that the Employer set up a hiring scheme designed to avoid having to hire a majority of Leno's employees.

In these circumstances, Michelin has made out its Wright Line defense and the charge should be dismissed, absent withdrawal, for insufficient evidence of violation.(7)

B.J.K.

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[1] **The representative told the Leno employees, inter alia, that they would have first crack at jobs with Michelin but that Michelin used an established list of hiring criteria that relate to**

performance and attendance.

**[2] [*FOIA Exemptions 6 and 7(c) and (d)*

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[3] While the "Review Guide" also evaluates employees on other softer factors incapable of mechanical application, such as "Efficiency," "Quality," and "Initiative," it appears that passing the five hard criteria cited above is required for a good evaluation.

[4] In seven cases, at the request of the applicant, Michelin made no inquiry of the applicant's current employer. In several other cases, the applicant was unemployed because his former employer had ceased operations. In all of these cases, Michelin checked with former employers, family and friends.

[5] Handy Andy, Inc., 313 NLRB 616 (1993). Compare cases where no Section 8(a)(3) violation was found, Hallmark & Son Coal Co., 299 NLRB 259 (1990), Wilson Tree Co., 312 NLRB 883 (1993), Master Mining, 274 NLRB 1213 (1985), with cases where the Board found a Section 8(a)(3) violation, Handy Andy, supra; Laro Maintenance Corp., 312 NLRB 155, n.2 (1993); Honda of Haward, 307 NLRB 340 (1992); Shortway Suburban Lines, Inc., 286 NLRB 323 (1987), enfd. without opinion, ___ F.2d ___, 129 LRRM 3144 (3d Cir. 1988); State Distributing Co., Inc., 282 NLRB 1048 (1987); Love's Barbeque Restaurant No. 62, 245 NLRB 78 (1979), enf'd in rel. part and modif'd 640 F.2d 1094 (9th Cir. 1981).

[6] Wright Line, 251 NLRB 1083(1980), enfd. 662 F.2d 899 (1st Cir. 1981), cert. denied 455 U.S. 989, approved in NLRB v. Transportation Management Corp., 462 U.S. 393 (1983).

**[7] [*FOIA Exemption 5*

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